state my conclusion that there is no evidence to show that the case of watches reached Singapore.

I now turn to deal with the defendants' contention that the contract was one to be performed by various successive carriers within the meaning of Article 30 of the convention. In support of this contention counsel for the defendants relied, first, upon an admission made by the plaintiffs that their agents in Geneva knew that the defendants did not operate a direct service between Geneva and Singapore, secondly, upon a time-table which was admitted by the plaintiffs to have been in force at the material time, and thirdly, upon the fact that the air consignment note contains the words "Name of first air carrier and address: Braathens S.A.F.E., Oslo." As to the first point, the fact that the plaintiffs' agents knew that there was no direct service between Geneva and Singapore does not, in my opinion, necessarily mean that they were entering into a contract of carriage to be performed by various successive carriers. They may have been totally unconcerned as to the manner in which the contract was to be performed; what they were concerned with was that the goods should arrive at their destination. As to the second point, no definite conclusion can, in my view, be drawn from the existence of the time-table. As to the third point, it is true that the printed form of air consignment note which was used in this case contains the words "Name of first air carrier and address" in print, followed by the typewritten words "Braathens S.A.F.E., Oslo." But it is to be observed that there is no reference in the contract to a second or any successive air carrier or carriers. In my opinion, the fact that the phrase "first air carrier" appears in the air consignment note, without more, is too tenuous a ground on which to base an argument that the contract was one to be performed by various successive carriers. On this aspect of the case, it is relevant to refer to the footnote at page 347 of *Shawcross* and *Beaumont* on Air Law (2nd Edn.) which, so far as is material, reads as follows:

> "It should be noted that the wording is "to be performed", not "performed". It is submitted that the effect of the words "to be", coupled with the reference back in Art. 30(1) to Art. 1(3), is to make the decisive factor the contract for the carriage, not the method by which the carriage is in fact performed."

It seems to me that the submission contained in this footnote is a valid one. In my opinion it is a correct statement of law that, in determining whether a contract of carriage is one to be performed by various successive carriers, the decisive factor is the contract for the carriage and not the method by which the carriage is in fact performed.

In the present case the defendants no doubt had the right under Article 6 paragraph 4 of the general conditions to substitute alternative carriers where it became necessary to expedite the movement of a consignment. But the fact that they had this right did not make the contract one to be performed by various successive carriers. It is to be observed that the defendants appear to be entitled to exercise the right to substitute alternative carriers even though the contract was to be performed by a single carrier. In my opinion, on its true construction, the contract of carriage in the present case was not one to be performed by various successive carriers.

It was also contended by counsel for the defendants that the loss occurred after the case of watches had been handed over to the Pacific Overseas Airways Siam Ltd., and further or in the alternative that the loss did not occur during the carriage by air. As to the first of these contentions, it is sufficient to say that there was no evidence that the case of watches was delivered to the Pacific Overseas Airways Siam Ltd. With regard to the contention that the loss did not occur during the carriage by air, it cannot be disputed that the case of watches was duly delivered to the defendants in Geneva for carriage by air to the plaintiffs in Singapore. As I have already stated, there is no evidence to show that the goods reached Singapore. In point of fact, there is no evidence to show what happened to the goods after they were delivered to the defendants. It is provided by section 107 of the Evidence Ordinance that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. In the present case the facts relating to the manner in which the goods were dealt with from the time they were handed over to the defendants up to the time of the discovery of the loss are especially within the knowledge of the defendants. However, the defendants have not called a single witness to testify to the facts and to explain what happened to the goods and what precautions were taken to prevent the loss of goods carried by them. In the circumstances I have come to the conclusion that the loss occurred during the carriage by air, and further that the defendants have failed to prove any of the allegations on which they have relied in defending this action.

For the reasons which I have stated there will be judgment for the plaintiffs for the sum of $17,986.03 with costs.

Judgment for the plaintiffs.

Solicitors: *Drew & Napier; Allen & Gledhill.*

KHAW JOO JEANG & ORS. v. KOAY SENG CHYE & ORS.

[O. C. J. (Rigby J.) December 7, 1959]

[Penang — Civil Suit No. 109 of 1959]

Landlord and Tenant — Lease of vacant land — Erection of 'hut' on land — Termination of lease — Licensees or sub-tenants — Control of Rent Ordinance, 1956 — Meaning of 'Premises' — Whether 'hut' a building of temporary character — Fixture.

The plaintiffs, who were the legal owners of a piece of land, leased it as vacant land in 1942 to a firm in which the first three defendants were partners. During the currency of the tenancy a 'hut' was erected on the land and was subsequently occupied by the other four defendants. The tenancy was terminated by notice on November 30, 1958, and the plaintiffs sought a declaration that the defendants were not entitled to remain on

the land. The first three defendants submitted to judgment being entered against them. The other four defendants sought the protection of the Control of Rent Ordinance as sub-tenants who were not affected by the notice to quit.

Held: (1) on the evidence, the four defendants were licencees of the firm;

(2) following *Evelyn Saw Hee Li* v. *Gan Tit Sun*[1], land, *qua* land, does not come within the meaning of 'premises' as defined in the Control of Rent Ordinance, and therefore the defendants were not afforded any protection.

Held further, that, even if the Control of Rent Ordinance were applicable, the plaintiffs were entitled to an order for the recovery of possession under section 12(1)(i) of the Ordinance.

Whether the 'hut' had become so attached to the land as to become a fixture considered.

Cases referred to:—

(1) *Evelyn Saw Hee Li* v. *Gan Tit Sun* [1959] M.L.J. 146.

(2) *Billing* v. *Pill* [1953] 2 All E.R. 1061 at p. 1063.

CIVIL ACTION.

L. E. Osman for the plaintiff.

Lee Kok Liang for 4th to 7th defendants.

1st, 2nd & 3rd defendants in person.

Cur. Adv. Vult.

Rigby J.: In this action the plaintiffs, as owners of a piece of land at the junction of Beach Street and Acheen Street Ghaut, Penang, claim a declaration that the defendants are not entitled to remain on the said land, and various orders consequential thereon. The plaintiffs are the legal owners of the land under a vesting deed and hold that land as trustees for a Chinese clan property trust known as Kong Lun Trust. The land is now required by the owners for the erection of a building of a permanent character for which plans have been approved by the City Council of George Town.

The first three defendants are partners in a firm known as Sin Guan Thye, to which firm the land in question was *let* in the first instance in or about 1942. The tenancy was duly determined by a notice to quit expiring on the 30th day of November, 1958. The first three defendants failed to comply with that notice. Hence these proceedings.

The first three defendants, although they entered an appearance to the action and duly filed a Statement of Defence, at the commencement of the hearing of these proceedings on the 19th November, 1959, submitted to judgment being given against them.

The land in question consists of an open piece of ground forming a corner site at the junction of Beach Street and Acheen Street Ghaut. On this piece of land are four stalls grouped irregularly together under a common roof of corrugated iron. The stalls are open at the sides and the roof is supported by wooden posts or pillars. The posts or pillars themselves are embedded into a cement surface, which serves as the floor for all four stalls. The stalls themselves cater for a section of the public in their several capacities as:—

(1) a "kanji" or rice stall;

(2) a beef soup stall;

(3) a coffee stall; and

(4) a fruit and ice water stall.

The stalls themselves, together with the communal roof which provides a rough and ready shelter, have been somewhat loosely and inaccurately referred to in the course of these proceedings as a "hut". It is, in fact, nothing of the kind.

These four defendants — that is to say, defendants Nos. 4 to 7 inclusive — base their claim to be, and to remain, in lawful possession of the land on which this so-called "hut" is constructed on alternative contentions. First, they maintain that their relatives became the tenants of this "hut" standing on the land and paid a monthly rent for the said "hut" to the Kong Lun Trust. They claim that through the passage of time the "hut" was repaired and extended with the permission and consent of the said Kong Lun Trust, or their servants and agents. Lastly, they aver that they succeeded to the tenancy of the premises on the deaths of their respective relatives and have been paying the monthly rents ever since. I have no hesitation in dismissing this limb of the defence. There is no evidence whatsoever of any such original letting to their ancestors, assuming they were their ancestors; nor is there any evidence of any payment of rent by the defendants direct to the plaintiffs from which an acceptance or acknowledgement of the defendants, as successors in title, might adequately or properly be inferred.

Alternatively, the defendants contend that they are the sub-tenants of the Sin Guan Thye partnership. They contend that part of the land originally leased by the Kong Lun Trust to the Sin Guan Thye partnership had a "hut" built on it; that this "hut" was subsequently sub-let to them by the tenants, Messrs. Sin Guan Thye; that up to the date of these proceedings they have regularly paid rent to Messrs. Sin Guan Thye; that as sub-tenants they are not affected by the notice to quit served on Messrs. Sin Guan Thye, and they claim the protection of the Control of Rent Ordinance, 1956.

The first question for consideration is: what was, in fact, the subject matter of the original letting by the Kong Lun Trust to Messrs. Sin Guan Thye? The defendants, as I have said, maintain that it was a piece of vacant land with a "hut" built on part of it. The plaintiffs, on the other hand, insist that the original letting consisted of no more than a piece of vacant land and that there was no "hut" on that land.

The defendants, for reasons to which I will later refer, base their claim to protection under the Control of Rent Ordinance on the existence of this "hut" on the land as forming part of the original letting to Messrs. Sin Guan Thye. The onus is upon them to show what comprised the original letting. In my view, they have wholly failed to discharge that onus, and have failed to prove that the "hut" was on the land at the time of the original letting. On the contrary, on the evidence I have heard, I am affirmatively

satisfied that the original letting to Messrs. Sin Guan Thye, during the Japanese occupation, consisted of vacant land.

I accept and believe the evidence of the witness Khaw Joo Jeang. This witness became one of the Kong Lun trustees in or about 1937. Some years prior to that he had been the owner of half of the land in question. The half which he owned had two shophouses on it. The other half, which belonged to his uncle, also had two shophouses on it. Some years before 1937 he sold his piece of land, with the shophouses on it, to a third party who, in turn, sold it to the Kong Lun Trust. The Kong Lun Trust had already acquired from his uncle, by way of purchase, the other piece of land with the two shophouses on it. Some time after the Kong Lun Trust had purchased the whole of this land the Trust received a notice from the Municipality requiring them to demolish the four shophouses on the land. This was done. Thereafter, in or about 1938, the whole of this land was let, as vacant land, to one Khoo Ban Poh. Mr. Khaw Joo Jeang, who had already become a trustee, told the Court — and I accept his evidence on this matter — that he was responsible for effecting the lease of that land, and that it was vacant land. Khoo Ban Poh disappeared at some stage during the Japanese bombing of Penang in December, 1941. At some time prior to December, 1941, Messrs. Sin Guan Thye had been in occupation of the land as sub-tenants of Khoo Ban Poh. Messrs. Sin Guan Thye were at that time already — and, indeed, still are — tenants of the Kong Lun Trust in respect of a piece of adjoining land with a building thereon. Apparently they used this piece of vacant land in connection with their business as merchants for the purpose of drying cloves, rattans, etc. On the disappearance of Khoo Ban Poh and during the Japanese occupation Messrs. Sin Guan Thye then rented this vacant land as head tenants direct from the Kong Lun Trust, and they remained as head tenants up to the date when they received the notice to quit expiring on the 30th November, 1958. Mr. Khaw Joo Jeang, as I have said, was insistent that the letting to Messrs. Sin Guan Thye was vacant land only and that at the time of such letting there was no "hut" on the land.

The evidence of this witness was substantially corroborated by one Chua Boon Hoe, who has been in the employment of the Kong Lun Trust since about 1920. Mr. Chua Boon Hoe said that the demolition of the shophouses on this piece of land took place about 1931 or 1932, and that the land was vacant when it was let to Khoo Ban Poh in or about 1937 or 1938, and remained vacant when it was later let in 1942 to Messrs. Sin Guan Thye. He said that the so-called "hut" or "shed" on the land was erected during the Japanese occupation some time after Messrs. Sin Guan Thye had taken over the tenancy.

Finally, that evidence was corroborated by one Yeoh Huah Hooi, who had himself lived in one of these shophouses which had been demolished. After the demolition the family firm moved to 233, Beach Street, which was immediately opposite the vacant site. He put the date of the demolition of the shophouses at about 1932 to 1933. I bear in mind that this witness was then only about 12 or 13 years old.

I am entirely satisfied that the defendants have wholly failed to prove that the original letting consisted of vacant land with this so-called "hut" built on part of it. On the contrary, I am satisfied that the original letting to Messrs. Sin Guan Thye was vacant land, and that the so-called "hut" was erected some time after that letting.

The evidence called by the defence established that there was, and is, a cement drain between the land itself and the main road. At some date subsequent to the demolition of the shophouses in or about 1931 or 1932, some of the stall holders encroached on to the site thus vacated. Bearing in mind the evidence of the witness Yeoh Huah Hooi, which I accept and believe, I have no doubt that some of the stall holders — presumably the former owners of the stalls now occupied by the defendants — pitched their stalls on the cement floors of the demolished shophouses and that the corrugated iron roof was thereafter erected. This is the so-called "hut" that now stands on the land.

I am fully satisfied that:

(1) The land was let to Messrs. Sin Guan Thye as vacant land;
(2) There was then no "hut" existing on it;
(3) The collection of stalls belonging to Defendants Nos. 4 to 7, with their communal corrugated iron roofing, were erected by the former occupiers of these or similar stalls after Messrs. Sin Guan Thye had become tenants of the vacant land; and
(4) Messrs. Sin Guan Thye were prepared to accept them as licensees as long as they made payment therefor.

In my view, and for the reasons I stated in the case of *Evelyn Saw Hee Li* v. *Gan Tit Sun*[1] land, *qua* land, does not come within the meaning of "premises" as defined in the Control of Rent Ordinance, 1956, and defendants Nos. 4 to 7 inclusive are not entitled to any protection under that Ordinance. The plaintiffs are, therefore, entitled to the declaration they seek as against defendants Nos. 4 to 7 inclusive.

It, therefore, becomes unnecessary for me to consider the alternative argument advanced by Mr. Osman, for the plaintiffs, which is based upon a consideration of section 12(1)(l) of the Control of Rent Ordinance. Mr. Osman contended that assuming the Control of Rent Ordinance was applicable, and assuming that these stalls — which I will euphemistically describe as "a building or buildings". — had been erected thereon after the original letting of the vacant land, nevertheless the evidence established that they were buildings of a temporary character. He submitted, therefore, that since there was uncontradicted evidence that the land was required by the owners for the erection of

a building of a permanent character for which plans had been approved by the local authority, the Court was still entitled, under section 12(1)(l) of the Control of Rent Ordinance, to make an order in favour of the plaintiffs for the recovery of possession of such land or "premises". If it had been necessary for me to consider that argument I would, on the facts of this case, have accepted it as correct, and made an order for possession under section 12(1)(l).

As Mr. Osman pointed out, the evidence called by the defence virtually shows that the original street vendors — or, at any rate, four of them — took advantage of the situation to move their impermanent stalls back off the street and on to the old cement floor of the demolished shophouses on the plaintiffs' vacant land. They were, in fact, squatters, whom the tenants, Messrs. Sin Guan Thye, were prepared to tolerate and accept as long as they made a regular payment for the site they occupied. The evidence of one of the defence witnesses was to the effect that when he first saw the stalls the wooden posts supporting the corrugated iron roof were cemented into kerosine tins, which themselves were resting on the cement floor. On the evidence, as I have already said, I have no doubt that the cement floor was the original floor of the demolished shophouses.

Whether a "building" has been so attached to the land as to become a fixture, and so form part of the land is a question of fact, or of mixed law and fact. It is common knowledge in this country — and has been repeatedly accepted by the Courts as such — that certain types of houses are movable property. In the case of *Billing* v. *Pill*[2] Lord Goddard, the then Chief Justice, quoted with approval the following passage from Halsbury's Laws of England as a test for determining whether a property was, or was not, to be regarded as forming part of the land as a fixture:—

"Whether a chattel has been so affixed to the land or building as to become a fixture depends on the object and purpose of the annexation, and if the chattel can be removed without doing irreparable damage to the premises, neither the method nor the degree of annexation, nor the quantum of damage that would be done to the chattel or to the premises by the removal, affect the question save in so far as they throw a light upon the object and purpose of the annexation. If the object and purpose was for the permanent and substantial improvement of the land or building, the article will be deemed to be a fixture, but if it was attached to the premises merely for a temporary purpose or for the more complete enjoyment and use of it as a chattel, then it will not lose its chattel character and it does not become part of the realty."

Photographs of this conglomeration of four stalls variously described as a "building", "shed" or "hut", have been produced in evidence, and I have further had the advantage of inspecting the place. Accepting, as I do, the evidence that the four stalls have been erected on the existing floor of the demolished shophouses, I find it impossible to accept, whether as a matter of fact or law, that merely because at some later date wooden pillars were embedded into the existing cement floor so as to support the corrugated iron roofing, the intention was that the construction so erected was for the "permanent and substantial improvement of the land" and accordingly to be deemed a fixture. Rather am I satisfied that the object and purpose of such a construction was for a temporary purpose — even though for an indefinite duration — to enable the stall holders to carry on their business with a greater degree of comfort and stability. In my view, the construction was not a fixture; it was "a building or buildings of a temporary character" within the meaning of section 12(1)(l) of the Control of Rent Ordinance, and had I considered that Ordinance applicable to the facts of this case I would have made an order thereunder in favour of the plaintiffs for the recovery of these "premises" as against defendants Nos. 4 to 7 inclusive. In making such an order, whilst I have the greatest sympathy with these defendants in the predicament in which they find themselves and the undoubted difficulty they must inevitably encounter in finding alternative sites at, or on, which they can carry on their livelihood, having regard to the fact that these proceedings were instituted seven months ago and to the fact that the land is required for the erection of a permanent building, the plans of which have already been approved by the local authority, I would not have been prepared to stay or suspend the execution of any order so made, or postpone the date of possession, for any period beyond the 31st January, 1960. There must accordingly be judgment with costs for the plaintiffs against defendants Nos. 4 to 7 inclusive in the terms as prayed in Prayers 1, 2 and 3 of the Statement of Claim. It may well be that the plaintiffs do not seek to press their claim for damages as against these defendants, but if they do wish to pursue that claim further, I will reserve for further argument and consideration this particular issue.

Judgment for the plaintiffs.

Solicitors: *Presgrave & Matthews; Lee Kok Liang.*